CHEN KONG THEATRES SDN BHD (IN LIQUIDATION) & ORS v. LEE GIOK TEE & ANOR

COURT OF APPEAL, PUTRAJAYA
ALIZATUL KHAIR OSMAN JCA
MARY LIM JCA
ZABARIAH MOHD YUSOF JCA
[CIVIL APPEAL NO: W-02(NCC)(A)-2319-12-2016]
16 APRIL 2018

CIVIL PROCEDURE: *Appeal – Notice of appeal – Appeal against order of winding up of company – Notice of appeal not served on liquidator of company – Whether ought to be served on liquidator – Whether liquidator directly affected by appeal – Whether failure to serve notice of appeal on liquidator rendered appeal defective – Whether appeal competent – Rules of the Court of Appeal 1994, r. 6*

CIVIL PROCEDURE: *Striking out – Application for – Application to strike out appeal – Appeal against order of winding up decision – Non-service of notice of appeal on liquidator of company – Whether rendered appeal defective – Whether ought to be struck out – Rules of the Court of Appeal 1994, r. 6*

This was an appeal against the order of winding-up of the first appellant. Three interlocutory applications arose for (i) the consolidation of this appeal with another appeal ('encl. 5a'); (ii) an order that the sanction of liquidator under s. 236(2) of the Companies Act 1965 was not required to file an appeal against the order of winding-up of the first appellant ('encl. 9a'); and (iii) the striking out of this appeal, made by the respondents and supported by the liquidator ('encl. 14a'), on the grounds that (a) the appeal was defective and not properly made before the court because the notice of appeal was never served on the liquidator of the first appellant; and (b) there was no sanction from the liquidator before the appeal was filed. The appellants argued that the non-service of the notice of appeal on the liquidator was because the liquidator was a neutral party.

Held (allowing encl. 14a; dismissing encls. 5a and 9a)
Per Mary Lim JCA delivering the judgment of the court:

(1) Any party who is 'directly affected by the appeal', within the meaning in r. 6 of the Rules of the Court of Appeal 1994 ('the ROCA'), must be served the notice of appeal. Rule 6 of the ROCA is mandatory in its terms, the failure of which renders the appeal incompetent. The present appeal concerned the winding-up of the first appellant. The liquidator was a party 'directly affected by the appeal' within the meaning in r. 6 of the ROCA. The liquidator must be served with the notice of appeal. (paras 14, 17, 18 & 19)

(2) The appellant admitted that the notice of appeal was not served on the liquidator. In fact, to date, none has been served. There were no applications to extend and/or abridge time for service of the notice of appeal or even the record of appeal. Since there was no such application, despite the appellants being aware of the non-service of the notice of appeal, the appeal was defective and the appropriate order was to strike out the appeal. (paras 13, 14 & 20)

(3) The application in encl. 14a was allowed and the appeal was struck out. Consequently, encls. 5a and 9a must also stand dismissed. (para 24)

Bahasa Malaysia *Headnotes*

Ini adalah rayuan terhadap perintah penggulungan perayu pertama. Tiga permohonan interlokutori timbul bagi (i) penggabungan rayuan ini dengan satu lagi rayuan ('lampiran 5a'); (ii) satu perintah bahawa kebenaran pelikuidasi bawah s. 236(2) Akta Syarikat 1965 tidak diperlukan untuk memfailkan rayuan terhadap perintah penggulungan perayu pertama ('lampiran 9a'); dan (iii) pembatalan rayuan ini, dibuat oleh responden-responden dan disokong oleh pelikuidasi ('lampiran 14a'), atas alasan (a) rayuan cacat dan tidak difailkan dengan teratur di mahkamah kerana notis rayuan tidak disampaikan kepada pelikuidasi perayu pertama; dan (b) tiada kebenaran oleh pelikuidasi sebelum rayuan difailkan. Perayu-perayu mendalihkan bahawa notis rayuan tidak disampaikan kepada pelikuidasi kerana pelikuidasi adalah pihak berkecuali.

Diputuskan (membenarkan lampiran 14a; menolak lampiran 5a dan 9a) Oleh Mary Lim HMR menyampaikan penghakiman mahkamah:

(1) Mana-mana pihak yang terkesan secara langsung, dalam maksud k. 6 Kaedah-Kaedah Mahkamah Rayuan 1994 ('KKMR'), mestilah disampaikan dengan notis rayuan. Kaedah 6 KKMR wajib terma-termanya dan kegagalannya menjadikan rayuan tidak kompeten. Rayuan ini berkaitan penggulungan perayu pertama. Pelikuidasi adalah pihak yang terkesan secara langsung dalam maksud k. 6 KKMR. Pelikuidasi mesti disampaikan dengan notis rayuan.

(2) Perayu mengakui notis rayuan tidak disampaikan kepada pelikuidasi. Malah, hingga kini, tiada apa-apa penyampaian. Tiada permohonan untuk melanjutkan dan/atau meringkaskan masa penyampaian notis rayuan atau rekod rayuan. Oleh kerana tiada permohonan sedemikian, walaupun perayu-perayu sedar akan ketiadaan penyampaian notis rayuan, rayuan cacat dan perintah sewajarnya adalah membatalkan rayuan.

(3) Permohonan dalam lampiran 14a dibenarkan dan rayuan dibatalkan. Berbangkit daripada itu, lampiran 5a dan 9a mesti ditolak.

Case(s) referred to:

Brinds Ltd & Ors v. Offshore Oil NL & Ors [1985] 10 ACLR 242 ***(refd)***
Gurbachan Singh v. Seagrott & Campbell (No 2) [1962] 1 LNS 48 HC ***(refd)***
Hock Seng Construction Sdn Bhd & Anor v. Yeoh Poh Owi & Anor [2001] 4 CLJ 1 CA ***(refd)***
Majlis Perbandaran Kangar v. Sonati Development Corporation Sdn Bhd [2006] 4 CLJ 953 CA ***(refd)***
Re Union Accident Insurance Co Ltd [1972] 1 All ER 1105 ***(refd)***
Soh Keng Hian v. American International Assurance Co Ltd [1996] 2 CLJ 449 CA ***(refd)***
Sri Hartamas Development Sdn Bhd v. MBf Finance Bhd [1991] 3 CLJ 2078; [1991] 1 CLJ (Rep) 436 SC ***(refd)***

Legislation referred to:

Companies Act 1965, s. 236(2)
Rules of the Court of Appeal 1994, rr. 6, 18(7), (9)

For the appellants - Wallace Wong & Jerry Ling Young Tuen; M/s Lee Ling & Partners
For the respondents - Eugene Choong Kuok Yuen; M/s PC Chong & Co

[Editor's note: Appeal from High Court, Kuala Lumpur; Companies (Winding-up) Petition No: WA28NCC-552-07-2016 (overruled in part).]

Reported by Najib Tamby

JUDGMENT

Mary Lim JCA:

[1] There were three interlocutory applications before us, namely encls. 5a, 9a and 14a, each with their respective affidavits in support.

[2] *Vide* encl. 5a, the appellants in this appeal seek to consolidate this appeal with Civil Appeal No. W-02(IM)(NCC)-2320-12-2016. The present appeal is against the order winding up the first appellant while Civil Appeal No. W-02(IM)(NCC)-2320-12-2016 concerns an interlocutory application for validation payment pending disposal of the winding-up petition.

[3] *Vide* encl. 9a, the appellants are seeking for an order that the sanction of the liquidator under s. 236(2) of the Companies Act 1965 is not required to file an appeal against the order of winding up the first appellant. If sanction is however required, the appellants seek a further order that the sanction be dispensed with for the purpose of the first appellant's appeal limited only for the purpose as nominal appellant on record. Alternatively, the second and third appellants are seeking leave to file and/or prosecute the appeal for and on behalf of the first appellant for the limited purpose as nominal appellant on record only in the notice of appeal dated 15 December 2016. These appellants are also seeking that any leave granted be with retrospective effect from the date of the notice of appeal.

[4] Finally, there is encl. 14a. This application is made by the respondents and it is supported by the liquidator. It is an application to strike out the appeal.

[5] After considering the intent of each of those applications, we decided that it was only appropriate that the court deal with encl. 14a first.

[6] By way of encl. 14a, the respondents sought to strike out the present appeal with costs on three grounds:

(i) that the appeal is defective and not properly before the court;

(ii) there is no sanction from the liquidator before the appeal was filed;

(iii) there was no resolution from the Board of Directors before the appeal was filed.

[7] In the affidavit filed in support of the application, the respondents claimed that the appeal is defective and not properly before the court because the notice of appeal was never served on the liquidator of the first appellant. An exchange of correspondence between the solicitors of the respective parties confirming the position of non-service on the liquidator was offered in evidence. The respondents contended that the liquidator, being an interested party, must be served with the notice of appeal. It was not. Instead, only the record of appeal was served and even then, it was served nearly two months out of time.

[8] The respondents further contended that the second and third appellants have failed to obtain sanction from the liquidator before filing this appeal on the first appellant's behalf. According to the respondents, because the first appellant was wound up by reason of the unlawful conduct of the second and third appellants which had adversely affected the interests of the first appellant's shareholders, sanction from the liquidator to file an appeal is necessary.

[9] Yet another reason was a claim that the Board of Directors of the first appellant had not resolved to file this appeal. Consequently, the second and third appellants have no *locus* to file the appeal and are said to be acting out of authority, residual or otherwise, to unilaterally decide matters on behalf of the Board of Directors. The Board comprises five directors and the second and third appellants are only two of five of them.

[10] The appellants did not file any affidavits in response to this application. Learned counsel for the liquidator confirmed that there was non-service of the notice of appeal and that the record of appeal was served late. In fact, an affidavit in reply was filed to this effect by the liquidator.

[11] This appeal turns on the interpretation and application of the Rules of the Court of Appeal 1994, in particular rr. 6, 18(7) and 18(9) which provide as follows:

> Service of notice of appeal
>
> 6. Notice of appeal **shall be served on all parties directly affected** by the appeal or their solicitors respectively within the time limited for the filing of the notice of appeal. It shall not be necessary to serve parties not so affected.
>
> Memorandum of appeal
>
> 18. (7) The memorandum and copies above referred to which, together shall be called the record of appeal, **shall be filed** at the Registry **within eight weeks** after the entry of the appeal.
>
> (7A) Notwithstanding subrule (7), if any copy of the documents specified in paragraph (4)(b), (d) or (e) is not available within eight weeks after the entry of the appeal, the appellant shall file the copy of the documents together with the memorandum of appeal as supplementary records of appeal within three weeks of being notified of its availability.
>
> (8) Sufficient copies of the record of appeal for the use of the Judges of the Court shall be sent to the Registrar when the record of appeal is filed.
>
> (9) The appellant **shall within the time limited for the filing of the record serve** a copy thereof on each party who has been served within the notice of appeal.
>
> (emphasis added)

[12] The decision of the High Court that is appealed against was made on 17 November 2016. The last day for entry of the notice of appeal would be 17 December 2016.

[13] The three appellants filed a notice of appeal on 15 December 2016. The appellants admit that the notice of appeal was not served on the liquidator. In fact, till to date, none has been served. Only the record of appeal was served on the liquidator and that was on 30 March 2017 while the last date for its service was on 17 February 2017. There are no applications to extend and/or abridge time for service of the notice of appeal or even the record of appeal.

[14] It is trite that any party who is "directly affected by the appeal" within the meaning in r. 6 must be served the notice of appeal. Rule 6 is mandatory in its terms, the failure of which renders the appeal incompetent. Although the Court of Appeal in *Majlis Perbandaran Kangar v. Sonati Development Corporation Sdn Bhd* [2006] 4 CLJ 953; [2007] 1 MLJ 133 following the earlier Court of Appeal decisions in *Soh Keng Hian v. American International Assurance Co Ltd* [1996] 2 CLJ 449; [1996] 1 MLJ 191 and *Gurbachan Singh v. Seagrott & Campbell (No 2*) [1962] 1 LNS 48; [1962] MLJ 370 held that an appeal which was not served at the time of appeal is not incompetent but

irregular, and that it was open to the court to deal with the irregularity in such manner and upon such terms as this court "shall think fit", it may only do so upon application by the appellants. In such applications, reasons must be offered. Since there are no such applications before us, despite the appellants being aware of the non-service of the notice of appeal, we are constrained to agree with the respondent and counsel acting for the liquidator that the appropriate order is to strike out the appeal.

[15] The position is somewhat compounded by the late service of the record of appeal, a service which has not been regularised by the appellants who adamantly stand by their position that the liquidator is not a party who must be served under r. 6. In the case of *Hock Seng Construction Sdn Bhd & Anor v. Yeoh Poh Owi & Anor* [2001] 4 CLJ 1; [2001] 3 MLJ 491, the Court of Appeal had proceeded to strike out an appeal where the record of appeal was served out of time.

[16] From the submissions of learned counsel for the appellants, the non-service of the notice of appeal on the liquidator was because the appellants perceived the liquidator as a neutral party. The subsequent service of the record of appeal was only in response to a request by the liquidator.

[17] The question then is whether the liquidator is a party "directly affected by the appeal" within the meaning in r. 6. If the answer is in the negative, r. 6 itself provides that it is not necessary to serve a person who is not so affected.

[18] In our view, the liquidator is undoubtedly a party directly affected by the appeal. The present appeal concerns the winding up of the first appellant. Although the Supreme Court in *Sri Hartamas Development Sdn Bhd v. MBF Finance Bhd* [1991] 3 CLJ 2078; [1991] 1 CLJ (Rep) 436; [1991] 3 MLJ 325 was of the view that the company that is the subject of the winding-up order has a right to be heard and to appeal against the order, the Supreme Court recognised that upon a company being wound up, it is the liquidator who acts on behalf of the company.

[19] On a practical note, the outcome of the appeal in respect of the winding-up order itself is obviously and logically of interest to the liquidator. If allowed, the liquidator's appointment will have to be set aside as a necessary consequence. We do not see how, given those circumstances the liquidator may be said to be a party who is not directly affected by the appeal. The liquidator certainly falls within the category of parties directly affected by the appeal. That being so, the liquidator must be served. The language in r. 6 is couched in mandatory terms and since there is failure to comply with this rule, the appeal is defective.

[20] We must add that the extent that the liquidator chooses to involve itself in the appeal is an entirely different question from the issue under consideration; the answer to which in our view does not alter or affect our reading of r. 6. It is mandatory that the liquidator, as a party directly affected

by the appeal, be served. In fact, the liquidator had asked to be served, and where it makes that request, it must be served. Since it was only served with the record of appeal and not the notice of appeal, we agree with the respondents and the liquidator that the appeal is defective and liable to be struck out.

[21] Given that there is no application before us to remedy that position, including one to extend time for service, we cannot see how the present appeal can remain in the list as a competent appeal. We also note that the other two applications filed by the appellants do not attend to these concerns at all. The appellants chose instead to stand by their assertion that the liquidator is not a party within the meaning of r. 6; and therefore need not be served. With respect, we disagree and we have already set out our reasons.

[22] In *Sri Hartamas Development Sdn Bhd v. MBf Finance Bhd*, the Supreme Court had observed that it was, *inter alia*, held in *Re Union Accident Insurance Co Ltd* [1972] 1 All ER 1105, "that notwithstanding the appointment of the provisional liquidator and the general resumption of the company's powers, the Board still retained certain residuary powers, which included the authority to instruct solicitors and counsel to oppose the petition and, if a winding up order is made, to appeal against the order. In that case, it was also held that the power to instruct solicitors and counsel is not the power which any one could suggest has passed to the provisional liquidator." The Supreme Court was prepared to follow this decision as it was also followed by the Supreme Court of Victoria, Australia in the case of *Brinds Ltd & Ors v. Offshore Oil NL & Ors* [1985] 10 ACLR 242. The Companies Act 1965 of Malaysia adopted the equivalent Australian legislation.

[23] Although in the present appeal, the liquidator appointed is not a provisional liquidator, we find the authority equally persuasive. In any event, even if the first appellant had residuary powers, there is no evidence to show that the Board of Directors had authorised the filing of the appeal. The notice of appeal was therefore, filed with want of authority.

[24] For all the reasons set out above, we were much constrained to agree with the respondents and the liquidator and allow the application in encl. 14a. This appeal is therefore struck out with costs to the respondents. With the striking out of the appeal, consequentially, encls. 5a and 9a must also stand dismissed with costs.